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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAROL MORSOVILLO, PETITIONER

v.

EIGHTH JUDICIAL DISTRICT COURT; BILL ELLIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Panel decision of the Ninth Circuit conflicts with the United States Supreme Court holdings in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) as applied to the underlying Title VII based causes of action for gender discrimination and a hostile work environment.

2. Whether the Panel decision of the Ninth Circuit conflicts with the United States Supreme Court holding in *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133 (2000) regarding the appropriate standards for review of the granting of a FRCP Rule 50 motion for judgment as a matter of law.

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The unpublished opinion of the United States Court of Appeals for the Ninth Circuit is set forth in Ninth Circuit case number 06-15148 (January 17, 2008). Appendix. The decision of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing is set forth, as well, in case number 06-15148 (February 27, 2008). Appendix. The decision and judgment of the United States District Court for the District of Nevada is set forth in United States District Court case number 2:00-cv-00115-PMP (December, 2005). Appendix.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, affirming the district court's judgment, was handed down on January 17, 2008. A timely petition for rehearing was denied on February 27, 2008. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

The original suit was filed in the United States District Court for the District of Nevada in January, 2000, based on federal question jurisdiction premised upon a cause of action under 42 U.S.C. Section 2000(e) and 42 U.S.C. Section 1983.

RELEVANT PROVISIONS INVOLVED

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000, et seq. Under 42 U.S.C. Section 2000(e)(2)(a), an unlawful employment practice consists of the following, in relevant part:

"(a)employment practices
It shall be an unlawful employment practice for an employer-
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."

STATEMENT

Following the receipt of a right to sue letter in October, 1999, from the Nevada Equal Rights Commission, Morsovillo filed her lawsuit in the United States District Court for the District of Nevada on January 27, 2000, in Las Vegas, Nevada. Federal jurisdiction in the district court was premised on allegations of gender discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, and civil rights violations, including Equal Protection violations, set forth in a claim under 42 U.S.C. Section 1983. This suit named as defendants Clark County, the Eighth Judicial District Court and various individual defendants employed with the District Court, including Charles Short, Rick Loop, Bill Ellis and Christina Chandler.

By way of its filed order on February 11, 2004, the district court granted summary judgment for Defendants Short, Loop, Chandler and Clark County. Only Defendants the Eighth Judicial District Court and Bill Ellis remained for trial. A jury trial commenced in this case in Las Vegas, Nevada on December 5, 2005, in the district court. Following the close of Morsovillo's

case in chief, the district court granted the defendants' Rule 50 motion for a directed verdict. Morsovillo thereafter appealed that decision to the United States Court of Appeals for the Ninth Circuit for direct appellate review of a final decision of the district court. On January 17, 2008, the Court of Appeals issued an unpublished decision affirming the order of the district court. Morsovillo timely filed a petition for rehearing which was denied on February 27, 2008.

In February, 1993, Carol Morsovillo began working as an administrative bailiff for the Eighth Judicial District Court in Las Vegas, Clark County, Nevada. (She had been previously transferred from working as a bailiff for the Clark County, Henderson Justice Court since October, 1991). In October, 1994, a position for a senior bailiff was posted in the state district court on a Clark County job announcement form and Carol Morsovillo applied for the position. Ultimately, the district court selected Defendant Bill Ellis for the position.

Based on the contention that Ellis did not qualify for the noted position and as a result of other gender discriminatory conduct and equal protection violations against her, Morsovillo filed a complaint with the Nevada Equal Rights Commission in February, 1995. An amended charge of discrimination was later filed in October, 1995. Morsovillo received her right to sue letter many years later in October, 1999, and thereafter filed her underlying lawsuit on January 27, 2000. Morsovillo remained employed with the Eighth Judicial District Court through the December, 2005, jury trial.

At the jury trial, the district court held, in granting the Rule 50 motion, as follows:

> " . . . the Court concludes that the plaintiff has simply not provided sufficient evidence to meet the requisite elements to allow a reasonable jury to find by a preponderance of the evidence that a claim for hostile work environment lies in this case and that under those circumstances, finding no legally sufficient evidentiary basis for a reasonable jury to find in favor of plaintiff on any of her remaining claims, the Court is compelled to grant defendant' s motion for judgment as a matter of law under Rule 50 and does so at this time."

The crux of the district court's Rule 50 order was its belief that Morsovillo did not present sufficient evidence that she suffered a hostile work environment, however, a review of the trial testimony indicated otherwise.

1. Testimony of Matthew Diamond:

Witness Matthew Diamond is a bailiff who began working for the Eighth Judicial, District Court in March, 1995, after many years in the New York City Police Department. Diamond indicated that when he started as a bailiff his chain of command consisted of his supervisor, Sgt. Bill Ellis, Rick Loop and Court Administrator Charles aka Chuck Short. When he was hired in 1995, he worked exclusively at the Family Court location of the state district court. Diamond testified that prior to Morsovillo's transfer to the Family Court in 1995, that Sgt. Bill Ellis called a

meeting of all of the administrative bailiffs in the Family Court. At this meeting, Ellis told the bailiffs that Morsovillo was coming to work at the Family Court and that they should all stay away from her because she is "trouble."

Diamond indicated that in 1995, there were only two female administrative bailiffs working Family Court, Morsovillo and Mary Daly. He also stated that only Sgt. Ellis would approve or assign overtime hours for the bailiffs. Diamond recalled Morsovillo telling him that she had complaints about Ellis' assignment of overtime hours and work assignments, as well as Ellis not allowing her to work as an acting supervisor when he was absent. Diamond also testified to witnessing Ellis express "statements of dissatisfaction" about Morsovillo to other bailiffs, her co-workers. Diamond described Morsovillo as a "top notch cop" and "very competent."

2. Testimony of Ludwig Belinc:

Ludwig Belinc testified that he was hired as an administrative bailiff for the district court in 1997, after 28 years working for the Newark City Police Department in New Jersey. He worked in the Family Court and his supervisor was Sgt. Bill Ellis. When he started in 1997, he recalled Morsovillo being the only female administrative bailiff at Family Court. Belinc was aware that Morsovillo was often not able to have a lunch break, while other bailiffs had the opportunity. Belinc testified that Ellis was responsible for allowing bailiffs to have their breaks and coordinate a relief bailiff to cover for a bailiff on such a break. Belinc testified that there were several times that Morsovillo

did not get such a break.

Belinc also recalled that when he started in 1997, Morsovillo was one of the most senior bailiffs at Family Court. Belinc testified that in 1997 he had several conversations with Bill Ellis wherein Ellis told Belinc to stay away from Morsovillo, that she was involved in another lawsuit and that he shouldn't say anything to her. Belinc also had a very good impression of Morsovillo's abilities as a bailiff and he eventually worked along side her at the courthouse.

Belinc tesified that he was aware of tension between Ellis and Morsovillo. Belinc recalled Ellis complaining to him about having "too many redheads working under him" referring to the dispatcher named Patricia Perrone and Morsovillo, both red-haired females.

3. Testimony of Randy Ford:

Randy Ford was hired as an administrative bailiff for the Family Court in September, 1998. Sgt. Ellis was Ford's supervisor. Ford was initially on a probationary status as a new hire in 1998. Ford recalled Ellis telling him the following about Morsovillo:

> ". . .And he just told me, we were up at the front gate, just him and me at one point, he told me that I should be careful, Carol was a troublemaker, not to hang out with her. He would hate me to see me not pass my probation 'cause I was hanging out with the wrong people." Ford had already met Morsovillo at work a few times prior to Ellis making that statement to

him, however, after Ellis' comments, Ford made sure that the kept his contact with Carol Morsovillo on a "professional level."

4. Testimony of McNeal Brown:

McNeal Brown was hired to work as a bailiff in 1993 for the district court. In 1995, he was transferred to work in the Family Court location for about one year. Brown testified that he was friends with Bill Ellis dating back to 1993 and they met at work in the courthouse. Brown testified that he was at the meeting called by Ellis prior to Morsovillo being transferred to the Family Court in 1995 and he recalled Ellis telling the bailiffs at the meeting to be careful around Morsovillo and that she was in litigation. At a later time, in a private meeting between Ellis and Brown, Ellis told him to stay away from Morsovillo because she's trouble.

At trial, Brown identified Plaintiff's Exhibit 19 which was a letter he had written to memorialize a conversation he had with Ellis on February 15, 1995. In this documented conversation, Brown wrote that Ellis again told him to stay away from Morsovillo and that she was a "bitch" and that she was "poison." Brown testified he heard Ellis refer to Morsovillo as a "bitch" on more than one occasion.

5. Testimony of Michael Ware:

Michael Ware started working for the Eighth Judicial District Court in 1994 performing human resource/payroll related functions. Ware also worked as a liason between the district court and the Clark

County Human Resource Department. He helped to coordinate the use of Clark County's HR Dept. to oversee human resource issues with the district court in the 1990's. Ware testified that there was an interlocal agreement in 1996 between the district court and Clark County which allowed the district court to use the County's Human Resource Department and policies and the County's Merit Personnel System.

Ware testified that he was never directed by court administrator Chuck Short to conduct any investigation into Morsovillo's claims made in her Nevada Equal Rights Commission charge of discrimination. Ware affirmed that the district court has a policy regarding how employees should complain about harassment in the workplace, which includes setting forth complaints to an immediate supervisor and further up the chain for resolution. Ware agreed that if an employee had a complaint of discrimination or harassment that the complaint must be dealt with in the department, but also involved Clark County's Human Resource Department. Ware did testify that a complaint may be resolved in a department by supervisors, however, he did indicate that for claims such as sexual harassment, "there's an obligation" to take the claim forward for an investigation and to involve the County.

6: Testimony of Christina Chandler:

Christina Chandler was hired in 1992 as the Family Division Administrator for the district court. In 1993, her title changed to Assistant Court Administrator at the Family Court. She remained in that capacity until her retirement. She managed the

daily operations of the administrative bailiffs at the Family Court. She interacted daily with Sgt. Bill Ellis who reported directly to her in the chain of command.

Chandler indicated that from 1995-2002, there was no written policy in place regarding how and when memos should be written by bailiffs and presented to the chain of command. Chandler stated that there was a policy in place against discrimination and harassment in the workplace at the district court. Chandler testified that part of the harassment policy was found in Defendant's Exhibit 509 which delineated things that constituted harassment in the workplace. Chandler agreed that under the policy, derogatory language could be considered harassment. She also agreed that if an incident of such harassment did occur that her office would participate in reviewing and investigating the claims. She also agreed that, depending on the type of grievance, that a potential claim of harassment would be referred to Clark County for further investigation. Chandler stated that any investigation of harassment would be turned over to Michael Ware as part of the investigation process.

Chandler recalled that in 1995, Morsovillo came to her with complaints about the manner of treatment from her supervisor Ellis. Morsovillo told Chandler, in writing and verbally, that Ellis had yelled at her at the front gate location in the courthouse in the public area and told her to shut up in front of other people. Chandler also recalled another time in the summer of 1995 that Ellis came to her and told her that Morsovillo had complaints about his treatment of her.

Chandler further indicated that Morsovillo was distressed about Ellis making comments to her about Morsovillo's weight and that Chandler admitted she spoke to Ellis about making comments of that type. Chandler stated that she had several conversations with Morsovillo about her concerns with Ellis, however, at no time did Chandler further any of the complaints to Clark County Human Resources. Chandler didn't feel that Ellis' conduct "rose to the level of harassment." Chandler claimed that there were management meetings with Charles Short, Rick Loop and Michael Ware in 1995 wherein they discussed Morsovillo's complaints and decided to not get the County HR Department involved for a further investigation. Again, Chandler indicated that Short, Loop, Ware and her did not think that Morsovillo's claims constituted harassment from Ellis, so they did not let the complaints go outside the Family Court to Clark County HR.

Chandler stated that after she saw Morsovillo's September, 1995, NERC Charge of Discrimination she did not have any conversations with Ellis about the Charge document.

In April, 2000, Chandler sent a memo directive to Morsovillo which criticized her use of writing memos and directed her to cease the practice.

Chandler also recalled that Morsovillo told her that Ellis was not allowing her to serve as acting supervisor. Chandler stated that after being advised of this, Morsovillo was put in the rotation to serve as acting supervisor when Ellis was not present. Chandler acknowledged that Morsovillo was one of the

more senior bailiffs at Family Court.

7. Testimony of Patricia Perrone:

Patricia Perrone started working for the Family Court in 1999 and worked until 2001 in the control room area for the bailiffs. Initially, she worked at the information desk in Family Court and was supervised by Bill Ellis. Perrone recalled that when she started working, Ellis told her to stay away from Morsovillo and that she sues everybody.

Perrone witnessed Ellis using profane language when he referenced matters involving Morsovillo, including saying "F her or that kind of thing." Perrone witnessed Ellis using profane language in the control room on a frequent basis. Perrone also repeatedly heard Ellis refer to Morsovillo as a "bitch" or "that bitch."

Perrone was aware that Ellis did not send other bailiffs to relieve Morsovillo so that she could have a lunch break during the day. Perrone also recalled that when male bailiffs needed assistance they received it, unlike Morsovillo, from Perrone testified that she witnessed Morsovillo in an emotional/distressed state of mind regarding Ellis' treatment of her on more than one occasion.

8. Testimony of Charles Short:

Short testified that from 1993 forward he was the Court Administrator for the Eighth Judicial District Court. In that role, he oversees and manages

the affairs of the district court as its main administrative officer. Short agreed that the use of derogatory language, such as calling a female district court employee a "bitch" is offensive and would violate the anti-harassment policies used by the court. Short denied having any notification that Morsovillo had filed a charge of discrimination with the Nevada Equal Rights Commission in 1995. Short denied having any knowledge about Ellis using derogatory language about Morsovillo.

When Short found out about Morsovillo's accusations against Ellis, he did not direct any investigation into the accusations. Indeed, Short claimed that he didn't know about any harassment or discrimination allegations until the lawsuit was filed in January, 2000.

9. Testimony of Richard Tamez:

Tamez was hired in August, 1999, as an administrative bailiff in the Family Court. Shortly after he started work, Sgt. Ellis, his new supervisor, told him to stay away from Morsovillo. Tamez testified that Ellis continued to tell him to stay away from Morsovillo, almost every week. Ellis also told Tamez that Morsovillo was "trouble." Tamez indicated that he also saw Morsovillo and Ellis engage in conversations at work and that Ellis was abrupt and would raise his voice to Morsovillo in the witnessed conversations. Tamez also testified that on one occasion he witnessed Ellis refer to Morsovillo as "a fat bitch" while he was working in the control room. On a separate occasion, Tamez recalled Ellis getting off the telephone with Morsovillo and saying "darn women or damn women"

after the call concluded.

10. Testimony of Patricia Doninger:

Patricia Doninger testified that she is the Domestic Violence Commissioner for the Family Court and has held that title since 1996. Judge Doninger recalled that Morsovillo often worked in her courtroom and she noticed that there were times that Morsovillo did not get a break. Judge Doninger testified that Morsovillo would call the control room to get someone to relieve her, in 2000 or 2001, for a break. Doninger also testified that many times Morsovillo could not get a relief bailiff to cover for her so that she could have a break.

Doninger recalled occasions when Morsovillo came to her in a visibly upset and in a distraught condition over problems she was having with Sgt. Ellis. Doninger also stated that Morsovillo told her that she was having chest pains.

11. Testimony of Lawrence Morsovillo:

Lawrence Morsovillo is the husband of Carol Morsovillo. He testified that in 1995 he recalled many occasions when she would come home from work in an extremely upset manner; that she was showing signs of depression; chest pains, back pains, and stomach problems. Mr. Morsovillo assisted his wife in seeking medical treatment in 1995 and in later years for her condition. He also testified that the problems his wife endured caused issues in their home life and affected their marriage.

12. Testimony of Bill Ellis:

Ellis started working as the Lead Bailiff of Family Court in December, 1994. Ellis acknowledged that he is aware of the district court's policies against discrimination in the workplace and that offensive words against someone's gender or race could violate that policy. Ellis admitted that he had a meeting of the administrative bailiffs in Family Court prior to Morsovillo coming to work at the location. He indicated that he wanted to tell all the bailiffs that "we're not going to tolerate any negative talk about Carol" Morsovillo. Ellis denied making any statements at the meeting that Morsovillo was trouble or a troublemaker. Indeed, Ellis testified that he has never referred to Morsovillo as a troublemaker.

Ellis denies that there was any incident in 1995 at the front gate of the courthouse wherein he allegedly yelled at Morsovillo or told her to shut up.

Ellis denied telling bailiff Randy Ford that he should stay away from Morsovillo or that his probationary status as an employee would be in jeopardy if he was around Morsovillo. Ellis stated that Randy Ford "lied" to the jury when he testified that Ellis spoke to him about Morsovillo.

Ellis also stated that Richard Tamez lied as well when he testified that Ellis had told him to stay away from Morsovillo. Ellis denied ever stating that Morsovillo was a "fat bitch" in the presence of Tamez.

Ellis denied ever telling Patricia Perrone to stay away from Morsovillo and that Morsovillo was trouble.

Ellis also denied using profane language in the control room at the courthouse. Ellis denied ever using the "f-word" referencing Morsovillo in the presence of Perrone. He also denied ever calling Morsovillo a "bitch" in the presence of Perrone. He stated that Perrone was "lying" when she testified about that statement.

Ellis denied ever telling McNeal Brown to not associate with Morsovillo. Ellis also denied ever telling Brown to "stay away from that bitch" or ever referring to Morsovillo as "poison" to Brown.

Ellis denied ever calling Morsovillo "fat." He also denied telling Morsovillo that the administration wants her to quit or leave her job.

Ellis was not aware of any investigation conducted by Christina Chandler or Charles Short into Morsovillo's accusations against him. Ellis stated that he was never contacted by Clark County's Human Resource Department about Morsovillo's accusations against him.

13. Testimony of Judge Gloria Sanchez:

Judge Gloria Sanchez was elected to the Family Court in 1993. She testified that on occasion Morsovillo would fill in as her courtroom bailiff when her normal bailiff was not available. Judge Sanchez recalled several occasions when Morsovillo came to her, privately, and was visibly upset.

14. Testimony of Chief Judge Steven Jones:

Judge Jones was elected to the Family Court in 1993. Chief Judge Jones also recalls Morsovillo coming to him voicing concerns and being visibly upset. He recalled that on some of those occasions, Morsovillo had complaints about Ellis. Judge Jones testified that he did ask both Christina Chandler and Charles Short if they were addressing Morsovillo's problems with Ellis. Judge Jones also recalled Morsovillo telling him that Ellis had used derogatory language about her. Judge Jones believed that Chandler and/or Short would address the concerns raised by Morsovillo, however, he did not conduct any investigation himself into her complaints.

15. Testimony of Rick Loop:

In April, 1994, Rick Loop was hired as the Assistant Court Administrator for the civil/criminal division of the district court. His duties included supervision of the administrative bailiffs. Loop recalled that he was aware that Morsovillo had "raised some issues" about Ellis and that there was discussion about what to do about it. He did not participate in any form of investigation in 1995 into Morsovillo's concerns with Ellis. He also did not recall any management meetings with Christina Chandler and Charles Short where Morsovillo's concerns with Ellis were discussed in 1995.

Loop testified that the district court had discretion in how it handled complaints of discrimination and the response given to those complaints. Loop testified that there was no written

policy between 1995 and 2003 which addressed memo writing or limitations on bailiffs in writing memos. Loop also testified that the administration chose to not reassign Ellis and/or Morsovillo from the Family Court, rather they left them working together despite Morsovillo's concerns.

16. Testimony of Carol Morsovillo:

Morsovillo has been in various law enforcement positions in Chicago and Nevada for 22 years. She began working in the Henderson Justice Court as a bailiff in Henderson, Nevada in October, 1991. She was involuntarily transferred from Henderson to the Eighth Judicial District Court in February, 1993, at the direction of Clark County, because she was being sexually harassed by a co-bailiff at the time. (That Title VII matter ultimately went to a jury trial in federal court and she prevailed in 1997). In October, 1994, Morsovillo applied for the lead bailiff position, as well as Bill Ellis, wherein Ellis ultimately was selected over her.

Morsovillo moved for a transfer to the Family Court location in March, 1995. Her transfer was effective in June, 1995. She discovered that Ellis had conducted the meeting with all of the administrative bailiffs prior to her transfer and she spoke with both Chandler and Ellis about it. Chandler indicated to her that it was necessary to have such a meeting. Ellis told Morsovillo that he had the meeting because he wanted to warn the co-workers that she files lawsuits. Ellis indicated that it was the "administration" that told him she filed lawsuits.

Morsovillo indicated that she started having problems with how Ellis was treating her in the summer of 1995. She testified to an incident wherein Ellis called her "fat." Morsovillo reported the statement to Chandler, who essentially down played the incident and did nothing substantive about it. Morsovillo also relayed an incident wherein Ellis yelled at her at the front gate and told her to shut up in front of members of the public and other bailiffs. In that summer of 1995, Morsovillo did follow her chain of command and the district court's anti-harassment policies and notified Chandler about these concerns. However, Morsovillo was not advised of any investigation conducted by Chandler or by the Clark County Human Resource office. Later in 1995, Morsovillo did file a complaint alleging discrimination and harassment with the Nevada Equal Rights Commission.

Morsovillo recalled telling Chandler in 1995 that Ellis was telling other bailiffs to stay away from her and using derogatory language like "poison bitch" with reference to her with third parties. Chandler told Morsovillo that she would conduct a "full blown investigation," however, this never occurred.

Ellis told Morsovillo as well that the administration wanted her to quit in 1995. Morsovillo also relayed how Ellis denied her training opportunities. Ellis also failed to appoint Morsovillo, as a senior officer, to serve as an acting supervisor in his absence, between 1995 and 1996. Later, when she did work as an acting supervisor, she was not provided acting supervisor pay, as other bailiffs were previously allowed by the district court.

Morsovillo testified that she would often work the TPO courtroom and was denied lunch breaks by Ellis. She testified that between 1995 and 2003 there were more than fifty times that she did not get lunch breaks. Ellis was responsible for her not being allowed lunch breaks or relief breaks.

Morsovillo recalled that in May, 1999, she had a conversation with Ellis and he told her that if any other bailiff told her to do something, she "better do it," including other male bailiffs that were junior to her in seniority. Again, she was the only full time female administrative bailiff at Family Court.

Morsovillo also testified that when she started in the Family Court she was not provided a private, female locker area, unlike the male bailiffs. Later in 1996, her locker was moved to a coed bathroom facility that was used by male bailiffs as well.

Morsovillo did try to transfer out of the Family Court several times over the years since 1995, without success.

Ellis was also responsible for giving Morsovillo her annual performance evaluations. Morsovillo testified that she did not receive a full 4% merit increase for several years, instead receiving a 3.5% increase. Morsovillo indicated that Ellis gave her, at times, negative performance evaluations, however, he did so without providing any feedback or counseling to her throughout the year at issue for the evaluation. The merit increase deficiency impacted her overall pay and accrued benefits.

After filing her lawsuit in January, 2000, Morsovillo received a written reprimand from Chandler indicating that she was not to write memos any more and to stop putting things in writing. There was no policy in place in 2000 which governed the writing and use of memoranda.

Morsovillo recalled having a few conversations with Ellis wherein she told him that he should stop telling people to stay away from her. Even as late as 2003, Ellis was telling new hires to stay away from Morsovillo. Morsovillo did relate how the problems she was having at work were impacting her at home. She did indicate that she was diagnosed with depression in 1995 and that she sought treatment for that and other medical-work related issues throughout the 1990's and into the 2000's. She was also prescribed anti-depressant medications during the relevant time frame after 1995.

17. Testimony of Dr. Saleha Baig:

Dr. Baig is a Las Vegas psychiatrist who first saw Morsovillo as a patient in January, 2002. Dr. Baig noted that Morsovillo was depressed and anxious and reported crying spells, low productivity, hopelessness, helpless feelings, feeling irritable, poor concentration, decreased energy, sleep problems, appetite problems, losing weight and panic attacks. Dr. Baig testified that Morsovillo was taking medications to assist with the symptoms of depression. Dr. Baig indicated that Morsovillo's main reported stressor was work-related. Dr. Baig continued with medication treatment to assist Morsovillo's care.

18. Trial Court Decision for Directed Verdict:

Following the close of Morsovillo's case in chief, the trial defendants moved for a Rule 50(a) motion for judgment as a matter of law. The district court analyzed all of Morsovillo's claims, including several state law claims, however, it was the court's analysis of her Title VII and 42 U.S. C. Section 1983 claims which is most relevant. The district court relied almost exclusively upon the Ninth Circuit holding in *Dominquez-Curry v. Nevada Transportation Department*, 424 F.3d 1027 (9th Cir., 2005) for authority to grant the Rule 50(a) motion. The district court ruled as follows:

> "Now the Court has listened carefully to the evidence presented by plaintiff in the case in chief over the past six days; to the testimony of 20 witnesses, some of whom have testified to statements made by Defendant Ellis and others; and much of the evidence relating to the work conditions experienced by the plaintiff including matters such as statements that were made that would certainly be negative perjorative and reference to someone as a "bitch" or "poison bitch," I can't - - I suppose you could have a context in which that would not be gender based but it's - - it wouldn't seem to lie here, that does seem to be gender based.
>
> Evidence concerning assignments, supervision and supervisory pay issues, union issues, the gun incident, the rude statement concerning and loud statement in a public setting regarding the plaintiff's weight, training issues, the locker

> facilities, and the annual evaluations. And at the end of all of that and placing the statements attributed to Defendant Ellis in context considering all of the circumstances the Court concludes that the plaintiff has simply not provided sufficient evidence to meet the requisite elements to allow a reasonable jury to find by a preponderance of the evidence that a claim for hostile work environment lies in this case and that under those circumstances, finding no legally sufficient evidentiary basis for a reasonable jury to find in favor of plaintiff on any of her remaining claims, the Court is compelled to grant defendant's motion for judgment as a matter of law under Rule 50 and does so at this time."

Appendix, District Court Transcript, Rule 50 Order.

Despite the foregoing evidence presented at trial, the Ninth Circuit decision affirming the district court order held that Ellis' conduct didn't create a hostile work environment because the conduct wasn't frequent, severe, pervasive or directed at Morsovillo because of her sex. The Ninth Circuit found that the evidence permitted no other reasonable conclusion, despite the extensive evidence presented in Morsovillo's case in chief.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit decision is in conflict with holdings from this Court and ignores existing Supreme Court precedent.

This Court has stated that in reviewing a FRCP 50 motion for judgment as a matter of law on appeal, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party. *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 149-50 (2000). This Court has stated that a court on a Rule 50 motion must not make credibility determinations nor weigh the evidence. *Id.*, 149-151. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* In *Reeves*, on review of a Rule 50 motion, this Court reversed the Court of Appeals for the Fifth Circuit which had impermissibly substituted its judgment concerning the weight of the evidence for that of the jury. The Ninth Circuit has further held, on a Rule 50 motion, that if conflicting inferences may be drawn from the facts, the case must go to the jury. *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1060 (9th Cir. 2000). The instant Ninth Circuit decision ignores and is in conflict with these standards of review and existing Supreme Court precedent for Title VII claims as set forth herein.

A Title VII hostile work environment claim is established when a plaintiff demonstrates that her work environment was so pervaded by harassment as to alter the terms and conditions of her employment:

> "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. . . They occur over a series of days or perhaps years, and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."

National Railroad Passenger Corp.v. Morgan, 536 U.S. 101, 115 (2002).

To prevail on a claim of hostile work environment, in the Ninth Circuit, based on gender, a plaintiff must establish: "that she was subjected to verbal or physical conduct because of her gender; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." *Kang v. U. Lim America, Inc.*, 296 F.3d 810, 817 (9th Cir. 2002). When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated. Morgan, 536 U .S. at 116.

A totality of the circumstances test is used to determine whether a plaintiff has established a colorable claim of hostile work environment. *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cit. 2000). Relevant factors for consideration to that test include the frequency and severity of the discriminatory conduct, whether such conduct was physically threatening or humiliating, or merely an offensive utterance, and whether the conduct unreasonably

interferes with the employee's work performance. Morgan, at 116.

Both the Ninth Circuit and the trial court in this matter relied on the decision of *Dominguez-Curry v. Nevada Transportation Department*, 424 F.3d 1027 (9th Cir., 2005) to defeat Morsovillo's Title VII claims. In *Dominguez-Curry*, the district court, at summary judgment, found that Dominguez's hostile work environment claim failed because it did not find that the alleged harasser's conduct was sufficiently severe or pervasive enough to alter the conditions of her employment. Id, at 1033-34. The district court ruled that harasser's conduct comprised "a series of isolated, sporadic incidents" that did not rise to the level of a hostile work environment. Id, at 1035. The Ninth Circuit conducted a de novo review of the record and found genuine factual disputes as to the severity and pervasiveness of harasser's conduct with Dominguez. *Id.* The Ninth Circuit found that he made numerous demeaning comments about women in the workplace, as well as open hostility to women and sexually explicit jokes in the office. *Id.*

The *Dominguez* Court used the "reasonable woman" standard from *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) to determine whether the workplace was objectively hostile. *Id.* 1034-35. That Court noted in determining an objectively hostile work environment: "we must assess all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and *whether it unreasonably interferes with an employee's work performance.*" *Id.*,

citing to *Clark County School District v. Breeden*, 532 U.S. 268, 270-71, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (emphasis added); see also, *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 21, 114 S.Ct. 367, 370 126 L.Ed.2d 295 (1993).

Dominguez found that the evidence presented at summary judgment was more than sufficient to create genuine issues of material fact and that the district court failed to view the evidence in the light most favorable to Dominguez. Id, at 1035-36. That district court improperly characterized the harasser's comments and jokes as "isolated and sporadic incidents" and that Dominguez's allegations were "vague and conclusory" and "self-serving." *Id.* , at 1035-36. The harasser even admitted that he made joking comments about women and others. *Id.* Bill Ellis, in this case, testified that everyone was a "liar."

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), the United States Supreme Court stated, in the context of a same-sex harassment case, that the ultimate question in determining the existence of a Title VII violation is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.*, at 80. As noted by the Ninth Circuit in *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991), "Title VII is not a fault based tort scheme. . .Title VII is aimed at the consequences or effects of an employment practice and not at the . . .motivation of co-workers or employers." This Court in *Oncale* also emphasized that the objective severity of the harassment is judged from a reasonable person standard based on all the circumstances. *Oncale*

at 81-82.

The *Oncale* concept was adopted by the Ninth Circuit in *Equal Employment Opportunity Commission v. National Education Association, Alaska*, 422 F.3d 840 (9th Cir. 2005). That case dealt with a female suffering harassment from her male supervisor which was not overtly sexual or gender specific, however, the Ninth Circuit relied on *Oncale* for its holding that:

> ". . .evidence of differences in subjective effects(along with, of course, evidence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender specific."

Id., at 846.

The *EEOC* decision noted that in the presence of sufficient circumstantial evidence, the "precise determination of how much qualitative and quantitative differences in treatment" between the sexes to support a Title VII claim is a jury question. *Id.*, at 847. In this case, the trial court denied Morsovillo that right for jury resolution.

The main issue in *EEOC, supra*, was whether the harasser's treatment of women differed sufficiently in quality and quantity from his treatment of men to support a claim of sex-based discrimination., *Id.*, at 844-45. *EEOC*, relying on the authority of *Oncale, supra*, held there is no legal requirement that hostile acts be overtly sex- or gender-specific in content, whether

marked by language, by sex or gender stereotypes, or by sexual overtures. Id, at 844-45. While sex- or gender-specific content is one way to establish discriminatory harassment, it is not the only way: "direct comparative evidence about how the alleged harasser treated members of both sexes is always an available evidentiary route." citing *to Oncale v. Sundowner. Id.*

This Supreme Court has held that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id, Oncale.* A pattern of abuse in the workplace directed at women, whether or not it is motivated by lust or by a desire to drive women out of the organization can violate Title VII. *EEOC*, at 846.

The *EEOC v. NEA* case relied on the "reasonable woman" standard set forth in *Ellison, supra.*, to wit: evidence of differences in subjective effects (along with evidence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific. *Id.*, at 846-47. This Court also relies upon the same standard, as set forth in *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). The *EEOC* court noted how the harasser treated men vs. women however it found that " there is no evidence in the record that any male employee manifested anywhere near the same severity of reactions (e.g. crying, feeling panicked and physically threatened, avoiding contact with the harasser, avoiding submitting overtime hours for fear of angering the harasser, calling the police, and

ultimately resigning) to the offending harasser's conduct as many of the female employees have reported. A few instances of hostile behavior towards male employees does not erase the possibility that a reasonable jury might find that the pattern of abuse directed at female employees was discriminatory." *Id.* at 846-47.

In *Faragher v. Boca Raton*, 524 U.S. 775, 786-788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), this Court affirmed that in determining the existence of Title VII discrimination, simple teasing, offhand comments and isolated incidents do not amount to a discriminatory change in the terms and conditions of employment to satisfy the "severe or pervasive" requirements of the statute. This was not the case regarding Morsovillo's claims as she presented evidence at trial that indicated an ongoing, severe and abusive workplace environment, under a totality of the circumstances test. *Harris v. Forklift Systems, Inc., supra*, at 21-23.

Trial testimony indicated that Carol Morsovillo endured adverse treatment from Bill Ellis which impacted her work and was ongoing between 1995 and 2003, not sporadic or isolated. As set forth above, Morsovillo's arrival at the Family Court in June, 1995, sparked the need for Bill Ellis to conduct a meeting of all the administrative bailiffs to discuss her upcoming presence. Trial witnesses, such as McNeal Brown and Matthew Diamond testified about the meeting and Ellis' statements that Morsovillo was trouble and that she files lawsuits. Ellis admitted he had the meeting, but denied making any statements about Morsovillo being a troublemaker.

Several witnesses testified that when they started working in the Family Court, Ellis warned them to stay away from Morsovillo and to avoid her as a troublemaker. Witnesses such as Patricia Perrone, Randy Ford, Ludwig Belinc and Richard Tamez all testified to Ellis' warnings about Morsovillo and the need for them to stay away from her. Indeed, Randy Ford testified that, in 1998, Ellis implied that his job would be in jeopardy if he associated with her and Richard Tamez testified that, in 1999, Ellis repeatedly told him to stay away from Morsovillo. Belinc, who started in 1997, was also told to stay away from Morsovillo. Ellis appeared to be making ongoing efforts, over time, to keep Morsovillo isolated and to control and intimidate other co-bailiffs to keep their distance.

Several witnesses provided testimony which indicated Ellis' disdain for Morsovillo. McNeal Brown testified to Ellis referring to her as a "bitch," and that she was "poison" in 1995. Richard Tamez recalled Ellis referring to her as a "fat bitch" while in the control room area. Patricia Perrone, who worked the control room between 1999-2001, testified that Ellis called Morsovillo a "bitch" on more than one occasion and that he used profane language such as the "F-word" when speaking about Morsovillo. Ellis also made derogatory comments about Morsovillo's weight directly to her, calling her fat. Christina Chandler verified that she was advised of this in 1995 by Morsovillo and that she allegedly spoke to Ellis about not using that type of language.

Under *Oncale*, Ellis also treated Morsovillo, who was one of the only female administrative bailiffs,

differently than her male co-workers. Ludwig Belinc testified about a number of occasions when Morsovillo would not be granted a relief bailiff to take a lunch break while working a courtroom. Judge Patricia Doninger verified this because it was her courtroom that Morsovillo often worked without a break. Patricia Perrone testified that, as the control room dispatcher, she was aware of many occasions that Ellis would not allow a relief bailiff for Morsovillo who was forced to work without a break for entire shifts. Perrone also testified that Ellis refused to send assistance to Morsovillo when she called for it to dispatch, while male bailiffs were regularly given assistance whenever they requested it from Ellis.

Ellis also denied Morsovillo the ability to work as an acting supervisor, despite her seniority status over many other male bailiffs. Indeed, it was only after Morsovillo complained to Christina Chandler did she get put in the rotation to have this job duty, like other male bailiffs. Under an *Oncale*-based comparative analysis, Morsovillo was treated more adversely than the predominantly male bailiffs of the district court.

The severity of Morsovillo's reaction to Ellis' ongoing hostility directed towards her was shown at trial by the testimony of several witnesses who documented different points in time when they encountered a distressed Morsovillo. Judge Jones testified that he recalled meeting with Morsovillo when she was visibly upset with complaints about Ellis. Judges Gloria Sanchez and Patricia Doninger also documented occasions wherein Morsovillo came to them and she was distraught or upset. Patricia Perrone also testified to Morsovillo coming to her on more than one

occasion being upset about Ellis. Even Christina Chandler testified that in 1995 Morsovillo came to her and was upset about Ellis' treatment of her. Under *Harris, supra*, the employee's psychological well-being is an additional factor for consideration under a totality of the circumstances analysis of the work environment. *Harris* at 23, 114 S.Ct. 367.

Dr. Baig testified to a number of physiological ailments reported by Morsovillo to her in January, 2002. Lawrence Morsovillo testified about his wife suffering physically in the 1990's, including chest pains, and that he arranged for medical care for her. Morsovillo herself testified about being diagnosed with depression in 1995 and that she had other medical ailments she believed were related to the stress-induced work environment.

As noted in *EEOC, supra*, and *Oncale, supra*, a pattern of abuse directed at women in the workplace, even if not motivated by lust or sexual desire, can violate Title VII. *EEOC*, 422. F3d at 845-46. The consequences and effects of the defendants' actions in this case, rather than Ellis' motivations, indicated at trial that Morsovillo suffered an ongoing and sufficiently severe hostile work environment to allow the matter to be submitted to the jury. *Id.* Perhaps more troubling was the trial testimony which indicated that district court administration in the Eighth Judicial District Court knew of Morsovillo's problems with Ellis and yet did very little to stop it.

Christina Chandler testified to conversations with Morsovillo in 1995 wherein Chandler was advised of derogatory conduct by Ellis against Morsovillo. Rick

Loop also testified as to his knowledge of some "issues" between Ellis and Morsovillo. Loop testified that a decision was made to let the two continue working together rather than a reassignment for one of them to another department of the district court to diffuse the "issues." Judge Jones testified that he was concerned enough about Morsovillo's problems with Ellis that he spoke to both Asst. Court Administrator Chandler and Court Administrator Charles Short about the problems and assumed they would address the matter. Charles Short, who oversaw the entire district court, testified that he didn't know about Morsovillo's problems with Ellis until after the January, 2000, lawsuit was filed. Notably, Chandler testified that Charles Short was involved in management team meetings in 1995 that discussed what to do, if anything, about Morsovillo's concerns with Ellis.

Chandler's testimony indicates that the Eighth Judicial District Court did not open a "full blown investigation" into any of Morsovillo's concerns about Ellis. Chandler stated that Short, Loop, Michael Ware and herself did not think that Ellis' conduct constituted harassment, so they never referred the matter to the Clark County Human Resource Department for an investigation. It appears that district court administration merely ignored Morsovillo's complaints and failed to take any corrective action to protect one of its employees, Morsovillo.

Michael Ware, the district court officer who was the liason with Clark County's Human Resource Department testified that he was never directed to conduct any investigation into Morsovillo's complaints. Chandler testified that any investigation of harassment

would be turned over to Ware as part of the process. Again, no investigation was ever authorized in this matter by the administration.

The Ninth Circuit in this matter, and the district court at trial, failed to consider all of the evidence presented at trial in the light most favorable to the plaintiff Morsovillo. This failure is in derogation to the standards of review set forth in *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133 (2000) and existing Ninth Circuit precedent regarding appellate review of the granting of a Rule 50 motion. The district court's finding that the evidence was not sufficient to present to the jury under a preponderance of evidence standard completely ignored extensive testimony, as noted herein, of the ongoing derogatory and adverse actions taken by Ellis against Morsovillo. The district court and the Ninth Circuit impermissibly weighed the evidence and made credibility determinations, which are the exclusive province of the jury. *Reeves* at 149-151. The Ninth Circuit's decision affirming this order was contrary to existing Supreme Court case law, as set forth in *Oncale*, *Harris*, and *Faragher*, *supra*, and the standards for review of a Rule 50 motion on appeal as set forth by this Court in *Reeves v. Sanderson Plumbing Prod. Inc.*, *supra*. Again, the trial testimony indicated that Ellis' bad behavior and animosity against Morsovillo was not limited to one, isolated event. Testimony in the plaintiff's case in chief revealed that Ellis continued to treat Morsovillo adversely and in an openly hostile manner throughout the rest of the 1990's and into the 2000's, unlike his conduct with male bailiffs. Morsovillo testified that even as late as 2003, Ellis told a new hire at the Family Court to stay away from her. This is not a case of Ellis calling Morsovillo a

"bitch" to a co-worker in the heat of a moment on one isolated occasion. Ellis regularly used profane and derogatory language about Morsovillo to the same co-workers that she must work alongside every day. From McNeal Brown's testimony regarding Ellis' comments in 1995 to Patricia Perrone's statements about Ellis' language in the control room as late as 2001, Ellis continued to engage in derogatory behavior regarding Carol Morsovillo.

Ellis' conduct created an objectively hostile work environment which was frequent, severe and repeated for several years and which unreasonably interfered with Morsovillo's work performance. *Harris*, at 21-23, 114 S.Ct. 367. The impact of this hostile work environment manifested itself in various moments when Morsovillo broke down or was visibly upset with court personnel like Judge Jones, Judge Sanchez, Judge Doninger and her co-worker Perrone. Work related depression and physical problems were a natural manifestation of this ongoing abusive work environment and evidence of those conditions was presented to the jury. Evidence of Morsovillo's distress and the severity of her reactions to Ellis' openly hostile and abusive treatment is a further factor of consideration of a Title VII violation. *Harris* at 23; *EEOC*, 422 F.3d at 846-47.

The trial court decision that "plaintiff has simply not provided sufficient evidence to meet the requisite elements" of a hostile work environment claim blatantly ignored cumulative testimony of direct harm to Morsovillo that was verified by numerous employees of the Eighth Judicial District Court. The district court's decision is contrary to existing Ninth Circuit Court's

decisions in *EEOC*, *supra*, and *Dominguez-Curry*, *supra*, as well as this Court's holdings in *Oncale*, *Harris* and *Faragher*, as well as the Rule 50 standards set forth in *Reeves*. Viewing the trial evidence in the light most favorable to Morsovillo's case in chief, both the trial court and the Ninth Circuit erred in their respective holdings against Morsovillo.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this matter.

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(any footnotes trail end of each document)

No. 06-15148
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL MORSOVILLO,
Plaintiff - Appellant,

v.

CHRISTINA CHANDLER; CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT; BILL ELLIS; JERRY KELLER; THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT; RICK LOOP; NEVADA EQUAL RIGHTS COMMISSION; NEVADA SERVICE EMPLOYEE'S UNION; STATE OF NEVADA; CHUCK SHORT; RICK SHORT; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendants - Appellees.

December 5, 2007 ** , Submitted, San Francisco, California**The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

January 17, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For CAROL MORSOVILLO, Plaintiff - Appellant: Kirk T. Kennedy, Esq., Las Vegas, NV.

For CHRISTINA CHANDLER, BILL ELLIS, CHUCK SHORT, Defendants - Appellees: Kimberly M. Rushton, Gary A. Pulliam, Esq., AGNV - OFFICE OF THE NEVADA ATTORNEY GENERAL (LAS VEGAS), Las Vegas, NV.

For CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT, Defendant - Appellee: Peter M. Angulo, Esq., RAWLINGS OLSON CANNON GORMLEY & DESRUISSEAUX, Las Vegas, NV; Susan M. Carrasco, Esq., Gary A. Pulliam, Esq., AGNV - OFFICE OF THE NEVADA ATTORNEY GENERAL (LAS VEGAS), Las Vegas, NV.

For JERRY KELLER, Defendant - Appellee: Peter M. Angulo, Esq., RAWLINGS OLSON CANNON GORMLEY & DESRUISSEAUX, Las Vegas, NV.

THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT, NEVADA EQUAL RIGHTS COMMISSION, NEVADA SERVICE EMPLOYEE'S UNION, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendants - Appellees: No appearance.

For RICK LOOP, Defendant - Appellee: Susan M. Carrasco, Esq., Gary A. Pulliam, Esq., AGNV - OFFICE OF THE NEVADA ATTORNEY GENERAL (LAS VEGAS), Las Vegas, NV.

For STATE OF NEVADA, Defendant - Appellee: Susan M. Carrasco, Esq., AGNV - OFFICE OF THE

NEVADA ATTORNEY GENERAL (LAS VEGAS), Las Vegas, NV.

For RICK SHORT, Defendant - Appellee: Thom Gover, AGNV - OFFICE OF THE NEVADA ATTORNEY GENERAL (LAS VEGAS), Las Vegas, NV.

JUDGES: Before: KOZINSKI, Chief Judge, COWEN *** and HAWKINS, Circuit Judges.

OPINION

MEMORANDUM *

Before: KOZINSKI, Chief Judge, COWEN*** and HAWKINS, Circuit Judges.

1. Ellis's conduct didn't create a hostile work environment because it wasn't frequent, severe, pervasive or directed at Morsovillo because of her sex. *See Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1034 (9th Cir. 2005); *Brooks v. City of San Mateo*, 229 F.3d 917, 923-24 (9th Cir. 2000). The evidence permits no other reasonable conclusion, so the district court did not err in granting a directed verdict in Ellis's favor on Morsovillo's hostile work environment claim. *See Peterson v. Kennedy*, 771 F.2d 1244, 1256 (9th Cir. 1985).

2. The other defendants can't be held liable for allowing Ellis to create a hostile work environment because the work environment wasn't hostile. There's no genuine issue of material fact on this point and the district court thus properly granted the other defendants' motion for summary judgment on Morsovillo's hostile work

environment claim. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002).

3. Morsovillo can't make a prima facie showing she was discriminated against in filling the "lead bailiff" job because Morsovillo wasn't qualified for the job and Ellis was. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Summary judgment in favor of defendants on Morsovillo's failure to promote claim was proper. *See Villiarimo*, 281 F.3d at 1061.

4. Because Ellis's conduct didn't create a hostile work environment, the district court properly granted Ellis's motion for a directed verdict on Morsovillo's negligence and negligent supervision claims. *See Peterson*, 771 F.2d at 1256.

5. Ellis's comments weren't "extreme" or "outrageous," so they can't be the basis of a claim for intentional infliction of emotional distress. *See Star v. Rabello*, 97 Nev. 124, 625 P.2d 90, 92 (Nev. 1981). Thus, Ellis was entitled to a directed verdict on this claim. *See Peterson*, 771 F.2d at 1256.

6. All other issues weren't raised in Morsovillo's brief and are therefore waived. *See Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003).

AFFIRMED.

Footnote

***The Honorable Robert E. Cowen, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

2:00-cv-115
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CAROL MORSOVILLO,
Plaintiff.

v.

CHRISTINA CHANDLER; CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT; BILL ELLIS; JERRY KELLER; THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT; RICK LOOP; NEVADA EQUAL RIGHTS COMMISSION; NEVADA SERVICE EMPLOYEE'S UNION; STATE OF NEVADA; CHUCK SHORT; RICK SHORT; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendants.

MINUTES OF THE COURT

December 14. 2005

PRESENT: THE HONORABLE PHILIP M. PRO, CHIEF U.S. DISTRICT JUDGE

DEPUTY CLERK: K.GOETSCH

RECORDER: ERIN SMITH

COUNSEL FOR PLAINTIFF(S): Kirk T. Kennedy

COUNSEL FOR DEFENDANT(S): Thom Gover, Holly

Eicher

PROCEEDINGS: JURY TRIAL (DAY 7)

8:29 a.m. Court convenes outside the presence of the jury. All parties are present.

In Accordance with the Court's findings on the record, **IT IS HEREBY ORDERED** the Motion by Defendant for Judgment of Acquittal pursuant to Rule 50(a) is GRANTED.

Judgment shall be entered in favor of the Defendant.

8:53 a.m. Court recesses and all counsel and parties exit the courtroom.

9:04 a.m. Court reconvenes in the presence of the jury. All members of the jury are present. The jury is thanked for their service and excused.

9:09 a.m. Court adjourns.

No. 06-15148
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CAROL MORSOVILLO,
Plaintiff - Appellant,

v.

CHRISTINA CHANDLER; CLARK COUNTY EIGHTH JUDICIAL DISTRICT COURT; BILL ELLIS; JERRY KELLER; THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT; RICK LOOP; NEVADA EQUAL RIGHTS COMMISSION; NEVADA SERVICE EMPLOYEE'S UNION; STATE OF NEVADA; CHUCK SHORT; RICK SHORT; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Defendants - Appellees.

JUDGES: Before: KOZINSKI, Chief Judge, COWEN *** and HAWKINS, Circuit Judges.

ORDER

The petition for rehearing and. for rehearing en banc is denied. See Fed. R. App. F. 35; Fed. R. App.

Footnote

*The Honorable Robert E. Cowen, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

PROCEEDINGS BEGAN AT 8:29 A.M. (Jury is not present) (Court is called to order)

THE COURT: All right, have a seat everybody. All right. Counsel, I wanted to proceed now with ruling on the outstanding motion for judgment as a matter of law, which was included in the original pretrial brief filed by defendants and which the parties argued yesterday.

I don't think counsel for defendants have ever tried a case, and probably not Mr. Kennedy has although it could have been criminal, maybe civil, maybe both over the years, but my habit is to make a very careful ruling on such motions and to state, even though it's not required under the rule, to state my rational as clearly as I can for purposes of appellate review. I think that's helpful. So I've cobbled together a lot of notes and I'm going to be reading through those because I want to be able to state my ruling as accurately as I can so that you can understand it and so that an appellate court if necessary can as well.

Plaintiff having rested her case in chief, the defendant has made a motion for judgment as a matter o£ law under Rule 50(a) as to each of the plaintiff's remaining six claims for relief.

Now the original complaint sets those forth, the surviving claims after the summary judgment rounds that we've been through as in Count One, hostile work environment under Title 7 against both Defendants Ellis and Eighth Judicial Court.

Count Two, violation o£ the Civil Rights Act, 42, U.S. Code, Section 1983 against Defendant Bill Ellis.

Intentional infliction or alternatively negligent infliction of emotional distress as set forth in Count Three. Count Four is a negligence claim as to Defendant Ellis.

Count Five is a negligent supervision claim as to Defendant Eighth Judicial District Court.

And Count Seven is a defamation claim against Defendant Ellis.

Count Six is no longer in the case; that contained other claims.

Now at the outset I want to note that I'm mindful of the long and for the parties involved undoubtedly painful history of this litigation. All the parties and their counsel have struggled with this case for a very long time.

The facts giving rise to it doubled that amount of time easily if not more prior to that and plaintiff has finally had the opportunity to present evidence supporting each of the claims against the two remaining defendants, Bill Ellis and the State Eighth Judicial Court.

And I have no doubt that she believes firmly that she was subjected to a gender based hostile work environment spawned by Defendant Ellis just as I'm sure Defendant Ellis believes as firmly he did not spawn such a -- an environment and the Eighth Judicial District Court believes through its administrators that it acted appropriately and plaintiff of course views it as otherwise.

Plaintiff's claim is fairly neatly summarized in paragraph 17H of the complaint which focuses as to Defendant Ellis more precisely and Eighth Judicial Court wherein the allegation states:

> "On or about January 1995 Defendant Bill Ellis, lead plaintiff at the time, made disparaging and/or discriminatory remarks against plaintiff, said remarks based on sex or gender. Defendant Ellis has continued with his inappropriate conduct since that time directed against the plaintiff and the defendants," meaning Eighth Judicial District Court, "have failed and/or refused and/or neglected to stop the subject conduct."

Now a motion under Rule 58 calls upon the Court to evaluate the evidence presented in a plaintiff's case in chief without making any judgments regarding credibility of witnesses. That's not a matter that the Court can consider at this stage.

I rather must accept all evidence presented in the plaintiff's case in chief in the light most favorable to the plaintiff and to determine whether as a matter of law the evidence educed is legally sufficient to enable a reasonable jury to return a verdict in favor of the plaintiff on any o£ her, in this case, six claims. And I want to turn to those claims at this point.

The negligent claim -- negligence claim as to Defendant Ellis, which is the fourth claim, at the outset I note that in yesterday's argument on defendant's Rule 58 motion plaintiff essentially conceded a claim of simple negligence, that that does not lie as to Defendant Ellis

who was plaintiff's direct supervisor, and the Court concludes that judgment in favor of defendant is appropriate as a matter of law under Rule 50(a) as to plaintiff's fourth claim for negligence.

As to defamation, that's plaintiff's seventh claim for relief, in Nevada under Branda v. Sanford (phonetic], which is at 637, Pacific 2d, 1223, whether a statement is capable of a defamatory construction is a question of law and as that same case makes clear insults or epitaphs such as referring to someone in a -- in a pejorative manner, in this case as a "bitch" or "poison bitch," are generally not actionable as a basis for a defamation claim.

Of course those statements must be considered in the context -- the factual context in which they were made and the Court is doing so in considering the statements and the different times that they've been attributed to Mr. Ellis. Again, I'm not making a judgment as to credibility whether they were or were not. I'm accepting for purposes of plaintiff's case in chief and for purposes of the Rule 50 motion that they were in fact made a's portrayed or argued by plaintiff.

In doing so the Court finds the opinion of the Nevada Supreme Court in Chowdry v. North Las Vegas Valley Hospital [phonetic] at 851, Pacific 2d, 458 is instructive there as here. Statements critical o£ a doctor who allegedly refused to treat patients were held to not be actionable or capable of defamatory meaning. And the Court finds that neither were the statements attributed to Defendant Ellis, although clearly offensive if made, clearly inappropriate if made, these were not capable of a defamatory meaning as that cause of action is defined

in Chowdry and the second restatement of tort, Section 558.

Now parenthetically I want to observe defendants had argued yesterday that under Jones v. Golden Spike at 623, Pacific 2d., 970 the allegedly defamatory statements are rendered nonactionable as they are analogous to an intercorporate or intergovernment privilege if you will.

But I think the more recent case o£ Simpson v. Mars at 929, Pacific 2d., 968 makes it fairly clear that while that privilege may exist it's an affirmative defense. The defendants must plead and prove if they're going to rely on it.

Defendants have not, in my determination, pled that in their answer or of course we're at Rule 58 so I'm not considering defendant's evidence. So I wanted to make that observation parenthetically even though I think the -- since the statements attributed to Defendant Ellis are not actionable as defamation in the context of this case I wanted to make the record very clear as to that privilege claim, and I think you ought to take a look at that and shepardize that case and you'll find some new law on that subject.

Turning to claim number 3, the intentional or alternatively negligent infliction of emotion distress and again calling upon the ruling of the Nevada Supreme Court in the Chowdry case and this Court's own prior ruling in Hershorn v. Sizzler [phonetic] at 913 Fed. Sub 1393, the Court finds that defendants are entitled to judgment as a matter of law under Rule 50(a) with regard to plaintiff's third claim or intentional

or negligent infliction of emotion distress.

The elements of that claim are set forth in Star v. Rebello [phonetic], we talked about them yesterday. They provide in Star to state a cause of action for intentional infliction of emotion distress in Nevada a plaintiff must allege one, the defendant's conduct was extreme and outrageous.

Two, the defendant either intentionally or recklessly caused the emotional distress.

Three, the plaintiff actually suffers severe or extreme emotional distress.

And four, the defendant's conduct actually or proximately caused the plaintiff's suffering.

Now the evidence educed at this trial- in plaintiff's case in chief simply fails to provide a basis on which a reasonable jury could find in plaintiff's favor as to even one let alone all four of those elements.

I'm not suggesting that the plaintiff is not genuinely distressed about the conditions in the workplace but that stress is not so severe or of such intensity that no reasonable person could be expected to endure it as noted in the Nevada Supreme Court -- the Nelson case that the parties have cited at different times. Nor is the conduct of Defendant Ellis even accepted as portrayed by plaintiff so extreme and so outrageous as to support a claim for infliction of emotional distress either intentionally or negligently.

That brings up something that's referenced with regard

to punitive damages not as a separate claim for relief but part of the prayer for damages, and 1 think the same weakness that I just cited with regard to the emotional distress claim exists here and commands granting plaintiff's Rule 50(a) motion with respect to plaintiff's claim for punitive damages against Defendant Ellis on any state law supplemental claims.

NRS 42.005 provides that punitive damages are recoverable only upon a showing of malice, fraud or oppression by clear and convincing evidence. It's a higher standard, it's not a preponderance of the evidence. It's clear and convincing evidence and the parties didn't really address that in any of their briefs or their jury instructions but that is the standard for punitive damages in the state of Nevada for state punitive damages claims.

Even were it otherwise the same -- even if it were more probably true than not true I think the same defect would exist but under that higher standard it's pellucid to me that the standard is not met looking at the evidence in the light most favorable to the plaintiff that a basis for punitive damages exists. It does not support a finding of the requisite malice or fraud or oppression or reckless disregard that would warrant an award of punitives.

Turning to the claims in Count Four and Five of negligence and negligent supervision, I've already address Count Four but Count Five the negligent supervision as to the Eighth Judicial District Court is really dependent on the underlying and the fundamental claim that really I think gives rise to this action and in some fashion all of the supplemental --

formerly called pendent but now referred to as supplemental and the rules state claims for relief, and that is the hostile work environment claim. It rises or it falls on that and the lynch pin of this entire case then really is plaintiff's claim that the conduct of Defendant Ellis combined with the failure of the Defendant Eighth Judicial District Court to properly supervise or control his conduct subjected the plaintiff, Ms. Morsovillo, to an actionable gender based hostile work environment in violation of Title 7 and in violation of Section 1983 of the Civil Rights Act.

In the past three months the Ninth Circuit Court of Appeals has rendered a couple of decisions and one of them specifically addresses the burden in a case such as this. I'm referring to the opinion of the Ninth Circuit Court of Appeals arising from the District of Nevada in Dominauez-Curry versus Nevada Transportation Department at 424 Fed. 3d. 1027. That's a case where a colleague in Reno granted summary judgment to defendants and the Court of Appeals reversed that grant of summary judgment and I want to address from that Dominguez case briefly the facts that were present and the standards that were articulated.

There the court found at page 1035:

> "A review of the record reveals that genuine factual disputes exist as to both the severity and the pervasiveness of the defendant's conduct. Plaintiff testified in her deposition that the defendant made numerous demeaning comments about women in the workplace including stating that women should only be in subservient positions. That women have no business in

> construction. That he," -- meaning the defendant -- "would never work with a woman. That the defendant wished he could hire men to do their jobs. That women in the department were being paid more than they deserved. That he," -- the defendant -- "wanted a man to fill the position occupied by Dominguez," the plaintiff.

Dominguez also testified that the defendant exhibited hostility to women who took maternity leave and that he told sexually explicit jokes in the office. A fairly consistent and repetitive pattern, severe pattern found by the court that warranted a trial, not a resolution on summary judgment which is the same standard we're applying in a Rule 50(a).

The court went on to articulate once again and most recently the standard to be applied. At page 1034 the court states:

> "To prevail on a hostile work environment sexual harassment claim the plaintiff must show that her work environment was both subjectively and objectively hostile. That is she must show that she perceived her work environment to be hostile," which in this case I don't doubt, "and that a reasonable person in her.position would perceive it to be so,"

referencing the Azteca [phonetic] case that was referenced by Mr. Kennedy yesterday.

> "The plaintiff also must prove that any harassment took place because of sex as a gender. In analyzing whether the alleged

> conduct created an objective hostile work environment we must assess all the circumstances including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Simple teasing, offhand comments, and isolated incidents unless extremely serious will not amount to discriminatory changes in the terms and conditions of employment."

That opinion is consistent with prior rulings of the Ninth Circuit such as Brooks versus the City of San Mateo at 229 Fed. 3d 917 which again stated the elements for a gender based hostile work environment as follows at page 923 in that opinion.

> "In order to prevail on her hostile work environment claim Brooks must show that her workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. The working environment must be both subjectively and objectively perceived as abusive. We use a totality of the circumstances to test -- I'm sorry, totality of the circumstances test to determine whether a plaintiff's allegations make out a colorable claim of hostile work environment.
>
> "When assessing the objective portion of a plaintiff's claim the court assumes the

> perspective of the reasonable victim. A female plaintiff states a prima facie case of hostile environmental sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."

Now the jury instructions that the parties have referenced that they have drawn from the 2004 Manual of the Ninth Circuit Court of Appeals Civil Jury Instructions, Chapter 12, are in accord with these and numerous rulings of the Ninth Circuit and the Supreme Court.

The evidence presented in plaintiff's case in chief in this case must be sufficient to permit a reasonable jury to find by a preponderance of the evidence that the plaintiff was subjected to slurs, insults, jokes or other verbal comments or intimidation of a sexual or gender based nature, that the conduct was unwelcome, that the conduct was sufficiently severe or pervasive to alter the conditions of plaintiff's employment and create a gender based abusive or hostile work environment, that the plaintiff perceived the working environment to be abusive or hostile, and that a reasonable person in the plaintiff's circumstances would also consider the environment to be abusive or hostile.

And, again, whether that environment constitutes a gender hostile work environment must be determined by looking at the totality of the circumstances including the frequency of the harassing conduct, the severity of the conduct, whether the conduct was physically threatening or humiliating or a mere offensive

utterance, and whether it unreasonably interfered with an employee's work performance. And that proceeds into the plaintiff's burden of showing that she suffered a tangible adverse employment action as a result of the conduct of Defendant Ellis and the Defendant Eighth Judicial District Court's failure to act or to control it.

Now the Court has listened carefully to the evidence presented by plaintiff in the case in chief over the past six days; to the testimony of 20 witnesses, some of whom have testified to statements made by Defendant Ellis and others; and much of the evidence relating to the work conditions experienced by the plaintiff including matters such as statements that were made that would certainly be negative pejorative and reference to someone as a "bitch" or a "poison bitch," I can't -- I suppose you could have a context in which that would not he gender based but it's -- it wouldn't seem to lie here, that does seem to be gender based.

Evidence concerning assignments, supervision and supervisory pay issues, union issues, the gun incident, the rude statement concerning and loud statement in a public setting regarding the plaintiff's weight, training issues, the locker facilities, and the annual evaluations. And at the end o£ all of that and placing the statements attributed to Defendant E11-is in context considering all of the circumstances the Court concludes that the plaintiff has simply not provided sufficient evidence to meet the requisite elements to allow a reasonable jury to find by a preponderance of the evidence that a claim for hostile work environment lies in this case and that under those circumstances, finding no legally sufficient evidentiary basis for a reasonable jury to find in favor of plaintiff on any of her remaining claims, the Court is

compelled to grant defendant's motion for judgment as a matter of law under Rule 50 and does so at this time.

Now I know that that is a unsatisfactory result for plaintiff and is something subject to appeal.

I understand that and respect that, that's why I've gone to some pains to make the findings and I recognize that sometimes trials have to take place to allow the evidence to flush out that from defendant's perspective I'm sure there's a desire that this could have been resolved -- I don't know, years ago on summary judgment, but sometimes that just does not happen. That probably would have been a good result had it been possible. I don't think it really was.

I'm going to discharge the jury as a result of my ruling. I won't require the parties to be present for that though you can remain. I will briefly explain to the jury without getting into detail what I've done and will then discharge the jury and will look forward to any additional motions or briefing that the parties may have.

With that we'll take a short recess. I want to give you a few minutes. In fact why don't, Kerri, you check with the parties, with counsel, whatever their desires are. If one remains I'd want all to remain for discharging the jury or if you want to leave you can do that.

I will tell the jury they're free to talk to you about the case if they wish to do so. They have no obligation to talk to counsel at all about it so I'll leave that to your judgment. But why don't we take about five minutes to allow it to be accomplished. All right.

(Court recessed at 8:53 a.m.)
PROCEEDINGS CONTINUE, NOT TRANSCRIBED